

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

ANDREW P.,

Claimant,

vs.

**EASTERN LOS ANGELES REGIONAL
CENTER,**

Service Agency.

OAH Case No. L 2006100674

DECISION

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on March 6, 2007, in Alhambra.

Claimant was represented by his adoptive father Ruben V.¹

The Eastern Los Angeles Regional Center (ELARC or Service Agency) was represented by Felipe Hernandez, Chief of Consumer Services.

The parties presented the documentary and testimonial evidence described below, and gave closing arguments. The matter was submitted for decision at the conclusion of the hearing on March 6, 2007.

ISSUE

Does Claimant have a developmental disability (mental retardation or autism) entitling him to eligibility for regional center services?

EVIDENCE RELIED UPON

Documentary: Service Agency exhibits 1-11; Claimant's exhibit A.

Testimonial: Dr. Randi Bienstock, Psychologist; Claimant's adoptive father Ruben V.

¹ Claimant and his family are referred to in a way intended to protect their privacy.

FACTUAL FINDINGS

Parties and Jurisdiction

1. Claimant is a four-year-old boy on whose behalf regional center services were requested from the Service Agency based on the categories of mental retardation and autism.

2. By a Notice of Proposed Action, dated August 3, 2006, the Service Agency gave written notice of its denial of Claimant's request, stating that its staff had concluded that Claimant does not qualify for services because he does not have mental retardation or any other developmental disability. It was further stated that psychological testing indicated to Service Agency staff that Claimant's cognitive functioning is within the average range of intelligence, and that Claimant has been diagnosed with non-qualifying conditions such as Communication Disorder NOS, Developmental Coordination Disorder (Rule Out) and Attention Deficit Hyperactivity Disorder- Combined Type (Rule Out).

3. On October 10, 2006, a Fair Hearing Request on Claimant's behalf was submitted, which timely appealed the Service Agency's denial of eligibility.

Claimant's Background and Developmental History

4. Claimant's early childhood was marred by abuse and neglect. He was prenatally exposed to alcohol and drugs. His biological mother's pregnancy was complicated by pregnancy-induced hypertension. Claimant resided with his biological mother as a newborn and infant, but was thereafter taken from her by the Los Angeles County Department of Children and Family Services (DCFS). Claimant was subsequently moved among various foster homes and relatives. Given Claimant's turbulent first three years, not much is known of his early development or when his developmental milestones were reached, if at all. Moreover, the evidence is unclear whether he was referred to a regional center for intervention services under the Early Start program before age three, although it is clear that no services were provided to him by that time.

5. After he turned three-years-old, Claimant was placed in his current home with his adoptive parents. Claimant lives there with his infant biological brother, who was also adopted into the family. By all accounts, Claimant has been provided with a loving and nurturing environment there. The primary concerns related by Claimant's adoptive parents are that their son has significant communication delays and that Claimant is not learning as he should for his age. The adoptive parents have also observed some behavioral problems, such as occasional aggression and inattentiveness.

6. (A) In conjunction with the adoption process, Claimant was assessed in November 2005, by licensed psychologist Sandi J. Fischer, of the TIES for adoption program at UCLA (TIES program). Overall, Dr. Fischer found Claimant to have global

developmental delays, particularly in his expressive language skills. Dr. Fischer also noted that Claimant had some motor deficits, particularly with balance.

(B) Dr. Fischer administered the cognitive test known as the Bayley Scales of Infant Development (Bayley). Claimant received standards scores of 65 in the mental scale and 68 in the motor scale, which Dr. Fischer described in her report as falling in the significantly to slightly delayed range. However, other evidence presented indicates that the Bayley test has a verbal component, meaning lower test scores are possible for someone like Claimant who has verbal deficits. In fact, Dr. Fischer noted in her report that it is possible Claimant did not understand some of the verbal instructions of the test.

(C) Dr. Fischer recommended services related to improving Claimant's speech and language skills and his motor deficits, including speech and language therapy, occupational therapy (OT) and an assessment for adapted physical education (APE). Although Dr. Fischer recommended referring Claimant to a regional center for services, she did not diagnose Claimant with mental retardation or autism, nor did she depict Claimant as demonstrating symptoms typical of those with either of those conditions.

7. (A) In January 2006, Claimant was evaluated by the Los Angeles Unified School District (LAUSD) and found to be eligible for special education services, including enrollment in a Special Education Preschool program, speech and language therapy and APE. LAUSD School Psychologist Valerie R. Wallace conducted the preschool psychological assessment of Claimant.

(B) In her report of this assessment, Ms. Wallace described Claimant as follows: average range nonverbal ability with some weakness noted in visual motor planning; below average range verbal ability; below average to average range school readiness skills with scatter noted amongst the various components; and significant delays in expressive skills. However, Ms. Wallace commented that school staff felt Claimant was learning and that he had been making steady improvement academically. Claimant's adaptive functioning in the area of self-help skills was described as within the average range.

(C) Ms. Wallace concluded in her report that the results of the evaluation indicated Claimant's skills were scattered (meaning some strengths and some weaknesses), with the most significant problem being a 25 percent delay in communication and school readiness skills involving expressive language. She commented that those delays may be related to Claimant's exposure to different languages (Spanish and English), his prior history of multiple foster placements and neglect in his first few years of life, and the fact that Claimant was still adjusting to his stable new adoptive home after all of his previous turmoil. She therefore stated that her test results were provisional in light of Claimant's recent improvement at school. Although she deemed Claimant eligible for special education services, Ms. Wallace noted in her report that Claimant's continued progress could result in future services being scaled back to focus on his speech and language delays relative to a possible future diagnosis of a specific learning disability.

The Service Agency's Assessment of Claimant

8. In May 2006, a psychosocial intake assessment of Claimant was completed by a Service Agency assessment counselor; also present was Claimant's adoptive father Ruben V., who provided background information concerning Claimant. At that time, Claimant's developmental history was taken and his current level of developmental functioning was assessed, with pertinent information being included in a report.

9. (A) The Service Agency thereafter referred Claimant to licensed psychologist Larry E. Gaines for a psychological evaluation, which was conducted in May 2006. Dr. Gaines interviewed Claimant and his adoptive father Ruben V., reviewed pertinent records, and made clinical observations of Claimant. Dr. Gaines describes in his report that Claimant was restricted in his language capabilities, but clear in his communication content. He also describes Claimant as cooperative, initially engaged in the testing process, and making good eye contact. However, during free play, Claimant was seen to be impulsive, impatient, and lacking attention during high-activity levels.

(B) Dr. Gaines also conducted formal testing of Claimant. The tests and results were as follows: Leiter International Performance Scale-Revised (cognitive functioning), full scale IQ of 92, described as within the average range, with a note that Claimant did not grasp the concept of repeated patterns; Peabody Picture Vocabulary Test-III (language skills), standard score 66, described as showing a mild range of deficiency, as well as inconsistent performance suggesting possible attention difficulties during the testing; Visual-Motor Integration Test, standard score 66, described as showing visual-motor and perceptual skills in the low-average range; and the Vineland Adaptive Behavior Scales (Vineland), composite score of 61, described as showing a mild range of deficiency. Dr. Gaines did not administer any tests aimed at determining the presence of autistic features.

(C) Dr. Gaines concluded that Claimant is functioning within the average range of intellectual ability, with some communication difficulties and some motor coordination problems, as well as a high degree of inattentiveness, compulsiveness, and hyperactivity suggestive of an Attention Deficit Hyperactivity Disorder (ADHD). Dr. Gaines concluded that a diagnosis of mental retardation was not warranted; instead, he diagnosed Claimant with a Communication Disorder NOS (not otherwise specified), and suggested further evaluation for a Developmental Coordination Disorder and ADHD.

10. On June 20, 2006, Randi Bienstock, Ph.D., a psychologist who consults with the Service Agency, reviewed Dr. Gaines' above-described report and findings. Dr. Bienstock noted that Dr. Gaines did not diagnosis Claimant with mental retardation or autism. Dr. Bienstock concluded that Claimant was therefore not eligible for services because he did not have a qualifying developmental disability.

11. On August 2, 2006, a Service Agency Interdisciplinary Assessment Team conducted an assessment meeting regarding Claimant in which the above-described information was reviewed and discussed. The team concluded that Claimant was not eligible for regional center services, for the reasons described above in Factual Finding 2.

12. Dr. Bienstock also testified during the hearing. She has sufficient experience diagnosing various early childhood developmental disabilities, and working with young children who have them, including autism and mental retardation. She has reviewed Claimant's file and is familiar with the above-described history and records. Dr. Bienstock participated in the Interdisciplinary Team meeting described above, and agrees with the team's conclusion that Claimant is not eligible for services. She persuasively testified that, in her opinion, Claimant is not autistic or mentally retarded. While she acknowledges Claimant's verbal communication delays, Dr. Bienstock relies on consistent full scale IQ test scores for Claimant well above the cut-off of 70 for mental retardation, including the 92 IQ score from Dr. Gaines and a nonverbal IQ score of 90 recently obtained by Dr. Fischer (and described in more detail below). Given Claimant's verbal communication problems and attention deficits, Dr. Bienstock believes Claimant's highest IQ scores may still be lower than his actual potential. Dr. Bienstock also notes that Claimant's progress and improvement at school indicates that Claimant has not yet reached his potential. She found no evidence in any of the records she reviewed indicative of stereotypical behavior consistent with autism, and notes that no professional has apparently even administered to Claimant a test designed to determine the presence of autistic features. Because Claimant's test scores are not depressed in all areas of cognitive functioning, but rather are related to verbal skills, Dr. Bienstock believes that Claimant has a communication problem, but not a condition similar with or related to mental retardation.

Assessments Submitted From Claimant and Related Information

13. (A) Dr. Fischer of the TIES program conducted subsequent evaluations of Claimant in December 2006 and January 2007, in anticipation of this hearing. It was known to her then that the Service Agency had already denied Claimant's request for services. Her undated report regarding those evaluations was presented. With regard to her recent work, Dr. Fischer reviewed Claimant records, interviewed Claimant's current teacher, obtained information from Claimant's adoptive parents, observed Claimant in and out of the classroom, and administered additional testing.

(B) Dr. Fischer notes in her report that Claimant's current teacher has commented that Claimant is doing well at school socially and that his "speech has grown a lot." However, some of the information supplied by Claimant's adoptive parents suggested to Dr. Fischer that Claimant has attention problems of clinical significance, as well as emotionally reactive and depressed syndromes in the borderline clinical range. For example, Claimant's adoptive parents have noted that Claimant is sometimes over-dependent, has difficulty separating from others, overeats, and cries a lot.

(C) Dr. Fischer administered the Stanford-Binet test, which yielded for Claimant a nonverbal IQ standard score of 90, a verbal IQ standard score of 77, and a full scale IQ of 82, results of which she describes as showing that Claimant "has areas of strength and areas of limitation." Specifically, Dr. Fischer describes Claimant as having solidly average nonverbal fluid reasoning; average range knowledge, which might be an under-estimation of his current ability; quantitative reasoning skills below expectations for a child of his age, possibly because he was not performing to the best of his ability during the subtest; average range nonverbal visual spatial processing; and working memory skills not at expected levels, with the possibility that his bilingual skills actually depressed his score. Dr. Fischer also stressed in her report that the test results should be viewed cautiously because it was not always clear that Claimant was trying his best during the tests. Dr. Fischer also acknowledged that Claimant's occasional sadness, overeating and similar behaviors could likely be related to his history of neglect and multiple foster home placements. Dr. Fischer does not include a diagnosis for Claimant in her report. Moreover, she does not recommend that Claimant be referred for regional center services, although she had made such a recommendation in her above-described report of 2005.

14. Claimant's adoptive father Ruben V. also testified in this matter. He is greatly concerned that Claimant did not receive Early Start services prior to turning three and is frustrated that Claimant is not receiving services other than special education at this time. He is satisfied with Claimant's current school placement. He questions the value of Dr. Gaines' evaluation and findings, because he testified that Dr. Gaines spent 15 to 20 minutes with his son and had told him at the conclusion of the session that his son was not eligible. Claimant's adoptive father believes that Claimant is eligible for services, because he strongly believes there must be some cognitive process creating Claimant's problems. For example, he cites to the facts that Dr. Fischer concluded that Claimant has "global developmental delays" and that some of the subtests of her IQ testing showed significant impairment. However, Claimant's adoptive father also candidly agreed that neither Dr. Fischer nor any of the other experts who have come into contact with his son have specifically diagnosed him with either mental retardation or autism.

15. Claimant's adoptive father has some trepidation over whether Claimant has Kabuki syndrome, a rare and little-known medical condition. This issue apparently arose when one of Claimant's treating physicians noted he had some unusual facial features consistent with this condition. However, recent genetic testing of Claimant indicates that he does not have this condition. Moreover, Service Agency Physician D. Figueroa states in an Interdisciplinary Note in Claimant's Service Agency file that her limited research indicates intellectual disability is only one of five diagnostic criteria for Kabuki syndrome and may not necessarily be present in all cases.

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LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)² An administrative hearing is available under the Lanterman Act to appeal a regional center's denial of a service request. (§§ 4700-4716.) Claimant properly appealed from the Service Agency's denial of his service request and thus jurisdiction was established. (Factual Findings 1-3.)

2. Where an applicant seeks to establish eligibility for government benefits or services, the burden of proof is on him. (*Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) More specifically, "the Lanterman Act and implementing regulations clearly defer to the expertise of the DDS (California Department of Developmental Services) and RC (regional center) professionals' determination as to whether an individual is developmentally disabled." (*Mason vs. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1127.) Thus, in determining whether an individual is eligible for services, it has been stated that the relevant inquiry is whether the claimant's expert witnesses' opinions on eligibility "sufficiently refuted" those expressed by the regional center's experts that claimant was not eligible. (*Id.*, at p. 1137.) The standard of proof in this case requires proof to a preponderance of the evidence, pursuant to Evidence Code section 115, because no other law or statute (including the Lanterman Act) requires otherwise.

3. An applicant is eligible for services under the Lanterman Act if it is established that he is suffering from a substantial disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism or what is referred to as the "fifth category" (a condition similar to mental retardation or which requires treatment similar to that required by those who are mentally retarded). (§ 4512, subd. (a).) A qualifying condition must also onset before one's 18th birthday and continue indefinitely thereafter. (§ 4512; Cal. Code Regs., tit. 17, § 54000, subds. (a), (b)(1), and (b)(3).)

4A. In this case, Claimant did not meet his burden of establishing that he is eligible for regional center services, in that he did not establish by a preponderance of the evidence that he has any qualifying developmental disability. (Factual Findings 1-15.)

4B. It was not established by a preponderance of the evidence that Claimant is mentally retarded or autistic. The Service Agency's experts have concluded that Claimant has neither condition. Their opinions are credible and supported by the evidence presented in this case. Claimant does not currently present a profile of a person who is mentally retarded or similar to one who is. He has average range skills in some areas and an overall IQ well above the cut-off for mental retardation. His deficiencies are related to verbal and communication skills, indicating his problem is more like a learning disability. Moreover,

² All further statutory references are to the Welfare and Institutions Code, unless noted.

the evidence also suggests that many of Claimant's current problems could be related to the trauma he suffered before the age of three. After being adopted and provided with proper care, Claimant has made good progress at home and in school. The evidence also indicates that Claimant is not yet functioning to his full capability, a situation inconsistent with mental retardation. There is no evidence of behaviors suggestive of autism. No known expert has ever diagnosed Claimant with either mental retardation or autism, including those at LAUSD or the TIES program. In fact, the most recent assessment done by Dr. Fischer of the TIES program omits the referral for regional center services contained in her initial report, indicating that she is not currently of the opinion that Claimant qualifies for services. In any event, in light of the above, it cannot be concluded that the assessments presented by Claimant as supporting his request for eligibility sufficiently rebuts the opinions of the Service Agency's experts that Claimant is not eligible.

ORDER

Claimant ANDREW P. failed to establish his eligibility for regional center services. Claimant's appeal of the EASTERN LOS ANGELES REGIONAL CENTER'S determination that he is not eligible for regional center services is denied.

DATED: March 18, 2007

ERIC SAWYER,
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision pursuant to Welfare and Institutions Code section 4712.5, subdivision (a). Both parties are bound by this decision. This decision may be appealed to a court of competent jurisdiction within 90 days of receipt of notice of this decision.